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In The
Supreme Court of the United States

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, LEE EVANSON and HEMET POLICE DEPARTMENT,

Petitioners,

vs.

THOMAS SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are the League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association.[1,2] The League of California Cities is an association of 476 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amici curiae*, their members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Both the petitioners and the respondent granted their consent to the filing of this *amici curiae* brief, and their letters of consent are being filed with the Court contemporaneously with the filing of this brief.

chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The cities and counties of California and the Ninth Circuit, whose interests are represented and protected by the *amici curiae*, will be significantly affected by the changes in existing law wrought by the Ninth Circuit's decision in this case. If allowed to stand, this decision will directly impact the manner in which their law enforcement officers will be expected to conduct themselves, the manner in which those officers will have to be trained, and the potential liability these local governments may face for actions by their peace officers. Each of the *amici curiae* believes that the Ninth's Circuit's decision in this case amounts to bad public policy which is contrary to this Court's prior decisions, and accordingly they urge this Court to grant the petition for writ of certiorari to reverse this erroneous decision by the Ninth Circuit.

I. THE NINTH CIRCUIT'S APPLICATION OF *HECK* WILL DISRUPT THE CRIMINAL JUSTICE SYSTEM, CREATE TENSIONS BETWEEN CIVIL AND CRIMINAL ATTORNEYS, AND IMPOSE NEW BURDENS ON THE POLICE

The petitioners have ably discussed why the Ninth's Circuit's decision in this case conflicts with this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), so the

amici will take this opportunity to advise this Court of several adverse consequences that they believe will flow from the Ninth Circuit's decision if it is allowed to stand.

The core of the Ninth Circuit's decision on this issue is found in its comment that "[b]ecause we are unable to determine 'the factual basis for [Smith's] plea,' his lawsuit does *not* necessarily imply the invalidity of his conviction and is therefore not barred by *Heck.*" (*Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005); emphasis in original; citations omitted.) The corollary that flows from this conclusion is obvious: in order for local governments to avoid civil liability resulting from the same conduct for which a criminal defendant has plead guilty, a detailed factual basis for the plea must be placed in the criminal record. But while easily stated, such a policy will be extraordinarily difficult to put into effect.

Our criminal justice system is dependent on plea bargains. The system would collapse if every criminal charge could only be resolved by means of a full trial. And the vast majority of criminal defendants prefer to work out a plea arrangement rather than face the uncertainty inherent in a trial. But incorporating the Ninth Circuit's *Smith* decision into that process will thoroughly disrupt it.

Prior to this decision, if the state and the criminal defendant are able to reach an agreement on a plea, it was not necessary for the prosecution to place on the record a lengthy factual foundation for the charges, nor was the trial court obliged to make explicit factual findings regarding the offense charged. (See discussion in Petition for Writ of Certiorari at pages 9-10.) In the wake of *Smith*, the simplicity and efficiency of this system has been turned against public entities. In order to create the necessary record, there will be a substantial increase in the time it will take to dispose of individual cases,

thereby significantly slowing an already crowded – indeed, over-burdened – criminal justice system.

If this decision stands, local governments employing the law enforcement officers who bring the criminal suspects to the prosecutors will have a vested interest in having extensive factual inquiries conducted even when there is a plea agreement, in order to forestall future plaintiffs from arguing, as has the respondent here, that his or her plea did not encompass each and every aspect of the criminal charges laid against him or her. Since local governments will not know in advance which of the suspects may decide to later pursue a civil lawsuit, they will, out of an abundance of caution, urge that these lengthy inquiries be conduced in *every* criminal case. If that request were to be honored, it would either bring the criminal justice system to a grinding halt or exponentially increase the cost of operating that system.

These demands will inevitably create significant tensions between prosecutors and other local government officials. Prosecutors obviously have an interest in the criminal justice system operating efficiently and have no desire to spend their time engaging in actions unnecessary to the accomplishment of *their* goals: the identification, conviction, and appropriate punishment of lawbreakers. It simply is not their job to defend the civil law interests of the various local governments with which they may come in contact (or even by which they may actually be employed).

And this tension between the civil and criminal halves of the system will not exist solely on the prosecutorial side. The state's inevitable reaction to the Ninth Circuit's decision will impose new burdens on, and create new conflicts for, criminal defense counsel.

Criminal defense attorneys have an ethical obligation to protect their client's best interests. That unquestionably

includes the obligation to incorporate into any plea agreement as many of the allegations of criminal conduct made against their client as possible. Prior to the *Smith* decision, that was a fairly uncomplicated process, accomplished simply by agreeing to a broad, undifferentiated plea to the charges brought by the state. (See Petition for Writ of Certiorari at pages 10-11.) But that will change if prosecutors, at the urging of local governments, start insisting that a detailed recitation of the facts underlying the plea be made in each case.

Under those circumstances, the criminal defense attorney will have to evaluate the potential consequences each portion of such a recitation may have on any *civil* claim the criminal defendant might be able to pursue. This will require criminal defense attorneys to engage in analyses for which they may have no training or experience. It will also require that the criminal defense attorney advise his or her client that any allegation left out of the recitation may result in new and separate charges being brought against the suspect. (See, e.g., discussion in dissent in *Smith, supra,* 394 F.3d at 709.) If the criminal defendant ultimately decides that he or she does not wish to endanger his or her possible civil case by agreeing to the factual recitation as proposed, the criminal defense attorney will then have to negotiate with the prosecutor to attempt to limit the scope of the factual recitation, leading to the absurd result that the prosecutor and defense counsel will be negotiating about the resolution of a criminal matter on the basis of its possible effect on a hypothetical future *civil* lawsuit. The criminal justice system has enough problems without turning it into the step-child of the civil law system.

Any change in the criminal justice system that requires extensive factual findings in every criminal prosecution will also impose new burdens on law enforcement. Prior to *Smith*, prosecutors, in negotiating pleas, were able

to rely on the written reports of the officers. But these reports were never meant to be the functional equivalent of testimony; they are not moment-by-moment, blow-by-blow descriptions of the events. If detailed factual recitations are going to be required with every plea, then either those reports are going to have to become much more detailed and extensive, or officers will actually have to testify on the record as part of the plea. Either route will result in officers spending far less time on the street doing their jobs protecting the public.

All of these negative consequences flow from the Ninth Circuit's interpretation of *Heck* as imposing *on the public entity defendants* the burden of proving that the prosecution of the plaintiff's 42 U.S.C. § 1983 claim "would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid." (*Smith, supra,* 394 F.3d at 699.). It makes far better public policy to put the burden on *the plaintiff* (the former criminal defendant) to show that success on his or her section 1983 claim "would *not* necessarily impugn his conviction." (*Ibid.*; emphasis added.) (The question of which party would have the burden of proof on this issue was not addressed in *Heck*.)

The criminal defendant is the only one who can decide whether he or she may have a civil claim against the arresting officers, and he or she is the only one who can decide whether to risk that possible claim in order to secure a favorable plea bargain. Nothing in the pre-*Smith* system precluded a criminal defendant from limiting his or her plea to specific acts, thereby leaving unaffected any civil claims he or she might have relating to other actions taken by the suspect and/or the arresting officers. The only limitation was whether the prosecutor was willing to agree to such a plea. Thus, any dispute over the scope of a plea, or the need for detailed factual recitations, would be limited to the handful of cases where the suspect was interested in preserving his or her possible civil claim.

Thus, there would be no need of changing the entire system.

Finally, although the Ninth Circuit, in its opinion, suggested that its analysis of the *Heck* rule applies only to situations where the plaintiff was convicted pursuant to a plea, rather than by a jury verdict, there is no reason to expect that distinction to survive for very long. The very rationale offered by the Ninth Circuit for this distinction is contrary to the analysis used by the Court to support its decision in favor of the respondent on the *Heck* issue.

> "Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would 'necessarily imply the invalidity of his conviction.'" (*Smith, supra,* 394 F.3d at 699, fn. 5; citations omitted.)

But a guilty plea similarly "does not determine which specific act or acts form the basis for the conviction" – in fact, that is the cornerstone of the Ninth Circuit's decision on this issue. But then, why doesn't the guilty plea too, like the jury verdict, "necessarily determine[] the lawfulness of the officers' actions throughout the whole course of the defendant's conduct"? The only way the Ninth Circuit will be able to resolve this inconsistency would be to reject one or the other of its positions, and there can be little doubt that, when ultimately confronted with this issue, it will reject the inconsistency embodied in footnote 5. That will mean that explicit fact finding will be required not only at the time of a plea, but also by the jury when it reaches a verdict.

If this comes about, it will be the end of the general verdict in criminal trials. Both prosecutors and defense counsel will insist on jurors explicitly resolving every disputed fact, in order to ensure that in any subsequent civil action the parties will be able to conclusively show that the jury did, or did not, resolve specific issues against the plaintiff/criminal defendant, thereby determining whether *Heck* can be applied to claims arising from that issue. So, if this decision is allowed to stand, not only may there be more criminal trials (as civil concerns prevent successful plea negotiations), those trials will take longer, as jurors are required to work their way through lengthy special verdict forms.

Placing the burden on the plaintiff to show that his or her claims are not precluded under *Heck* will impose little burden on the plaintiff or the justice system. Placing that burden on the defendant local governments, as the Ninth Circuit has done in this case, will create immense burdens on both those local governments and the criminal justice system. Accordingly, the *amici curiae* urge this Court to accept this case in order to resolve this important policy issue.

II. THE NINTH CIRCUIT'S REQUIREMENT THAT PEACE OFFICERS' USE OF FORCE WILL BE DEEMED REASONABLE ONLY IF IT CONSTITUTES THE LEAST INTRUSIVE ALTERNATIVE IS CONTRARY TO EXISTING LAW, WILL UNDERMINE THIS COURT'S *SAUCIER* DECISION, AND WILL GREATLY ENDANGER PEACE OFFICERS

This Court, in *Graham v. Connor,* 490 U.S. 386 (1989), set out the standards for evaluating whether a peace officer's use of force was reasonable. But the Ninth Circuit expands on this Court's holding, adding that "[i]n some

cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider." (*Smith, supra,* 394 F.3d at 701.) The Court does not explain how it can reach this decision without overruling – or even commenting – on its own contrary decision, *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994), in which the Court wrote that:

> "Plaintiff argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." (Citations omitted.)

This analysis, now apparently repudiated by the Ninth Circuit, flows logically and directly from this Court's similar discussion in *Graham.*

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the

> fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." (*Graham, supra,* 490 U.S. at 396-397.)

The Ninth Circuit's new standard, as embodied in the *Smith* decision, now not only permits, but essentially requires, the application of "the 20/20 vision of hindsight." Now, every use of force case will "entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment" (*Scott, supra,* 39 F.3d at 915), because it is impossible to conceive of a situation where a plaintiff will not be able to at least argue that there existed a less intrusive alternative to the use of force.

The net effect of this will be to undermine this Court's decision in *Saucier v. Katz,* 533 U.S. 194 (2001). In *Saucier*, this Court reversed the Ninth Circuit's decision, commenting that:

> "The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." (*Id.* at 202; citations omitted.)

But by creating a least intrusive alternative requirement for excessive force cases, the Ninth Circuit has once again made it impossible to obtain qualified immunity summary judgments on excessive force claims. This Court made clear in *Saucier* that such a result was unacceptable.

If, despite all this, the Ninth Circuit's new rule is allowed to stand, it will significantly increase the danger facing peace officers. As Judge Kozinski wrote in *Scott*, "[i]mposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves." (*Scott, supra,* 39 F.3d at 915.)

> "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only." (*Ibid.*)

The end result of such interference with the ability of peace officers to respond to ever-evolving and quickly changing situations will be the injury and death of some of those officers. As it is, more than three officers a week are dying in the line of duty, and an officer is being assaulted while on the job approximately every 9 minutes.[3] Appallingly high as these numbers are, one can only shudder to imagine how much higher they will be if officers are forced to delay responding to dangerous situations because they are trying "to find and choose the least intrusive alternative".

It is perfectly appropriate to hold peace officers to the straight-forward *objective* standard for the use of force established by this Court in *Graham.* Officers can be

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[3] Derived from statistics for the years 1993-2004 compiled by the Federal Bureau of Investigation and the National Law Enforcement Officers Memorial Fund, Inc., as found on the Fund's website, located at http://www.1nleomf.com/TheMemorial/Facts/daifacts.htm.

trained to understand and apply that standard, and if they comply with that standard, neither they, nor their employer, will, or should, be held liable on a claim that the use of force was excessive. But no officer can be trained to anticipate how a Monday-morning quarterback will analyze his or her actions, or to instantaneously recognize each and every alternative available to respond to a situation and immediately choose that one which, in calm hindsight, some expert will opine was the "least intrusive alternative" available. We already ask an enormous amount from our peace officers. Let's not ask them to do the impossible.

Accordingly, the *amici curiae* urge this Court to accept this case in order to derail this dangerous development in the law.

III. THE NINTH CIRCUIT'S ADOPTION OF THE MODEL PENAL CODE'S DEFINITION OF DEADLY FORCE CREATES AN UNWORKABLE STANDARD FOR LAW ENFORCEMENT, ONE THAT WAS NEVER INTENDED BY THE DRAFTERS OF THE MODEL PENAL CODE

In *Smith*, the Ninth Circuit overruled its earlier decision of *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), in which the Court had defined "deadly force" for the purposes of the application of the rule limiting the use of such force set out by this Court in its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). Rejecting the *Vera Cruz* court's definition of such force as "force reasonably likely to kill" (*Vera Cruz, supra*, 139 F.3d at 660), the Ninth Circuit instead held "that in this circuit 'deadly force' has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code. We define deadly force as force that creates a substantial risk of causing death or

serious bodily injury." (*Smith, supra,* 394 F.3d at 693.) But this is not a use for which the Model Penal Code was ever intended.

A. The Model Penal Code's Definition Of Deadly Force Was Not Intended For Use In Civil Cases Such As This

The Ninth Circuit's reliance on the Model Penal Code's (hereafter referred to as the "MPC") definition of deadly force reflects a fundamental misunderstanding of the purpose of the MPC.

The MPC is a *criminal* code, not a civil code. "The main aim of a criminal code is to differentiate conduct that warrants *criminal* sanctions from conduct that does not." (*Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, General Provisions, §§ 3.01 to 5.07 (1985) (American Law Institute, Philadelphia, PA) [hereafter referred to as the "*MPC Commentaries*"], page 4; emphasis added.) The drafters were not seeking to establish a civil standard for appropriate conduct (see *Model Penal Code: Official Draft and Explanatory Notes* (1985) (American Law Institute, Philadelphia, PA) [hereafter referred to as the "*MPC Official Draft*"], Section 3.01(2)), and felt free to deviate from those standards when they deemed it appropriate for reasons of "sound legislative policy". (*MPC Commentaries,* page 2.)

The MPC does indeed offer a definition of "deadly force", as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." (*MPC Official Draft*, Section 3.11(2).) Section 3.11 is the "Definitions" section for Article 3 of the MPC – "General Principles of Justification". "This article formulates justification for conduct that otherwise would constitute an offense, to the extent that it has seemed feasible to do so in general

terms." (*MPC Commentaries*, page 1.) The definition of "deadly force" contained in Section 3.11(2) is a unitary definition for *all* of Article 3 of the Code, not just the section dealing with the use of force by police officers. The ten other sections of Article 3 provide the details of the affirmative defense of justification to criminal charges. Section 3.07 covers the "Use of Force in Law Enforcement".

Section 3.07(2)(b) sets out the MPC's standards for the use of deadly force by police officers. In the drafters' lengthy commentary on this section, a constant refrain is their concern over the use of *firearms* by law enforcement. (See, e.g., *MPC Commentaries*, page 111 ["*shoot* to prevent the escape"]; page 115 ["reckless use of *firearms*"]; page 116 ["in an age of *firearms*"]; all emphasis added.)

The drafters consistently discuss deadly force as that which would result in the death of the suspect. They note that the common law rule permitted the "*killing* of a resisting or fleeing felon" because virtually all felonies originally were punishable by death. (*MPC Commentaries*, §3.07, page 113.) Now, however, "[r]elatively few crimes are punishable by death." (*Ibid.*) They also retreat from the common law rules "that allowed the *killing* of criminals" in order to prevent the commission of crimes (*id.* at 132), finding instead that "resort to the privilege to *kill* in crime prevention will rarely be necessary." (*Id.* at 133.) (All emphasis added.)

In short, the drafters of the MPC were concerned with actions taken by police officers that might result in the *death* of criminal suspects, and sought to establish principles for the use of such deadly force. They established these principles in the context of a *criminal* code, to clarify the circumstances under which police officers might be *criminally prosecuted* for their conduct, *not* to establish standards for determining whether the officers could be

held civilly liable for that conduct. As the drafters themselves commented:

> "The police must make a practical and often hasty decision whether or not they are dealing with a person who may be a dangerous criminal in the sense of being a threat to life or limb. They are accustomed to making such decisions, and would rarely be *prosecuted* save in the most egregious of situations." (*MPC Commentaries*, §3.07, page 124; emphasis added.)

As the *Vera Cruz* opinion noted, "[t]he MPC's definition and *Garner*'s deadly force rule serve entirely different purposes: The MPC is designed to govern criminal liability; *Garner*'s deadly force rule sets the boundaries of reasonable police conduct under the Fourth Amendment." (*Vera Cruz, supra,* 139 F.3d at 662.) The Court continued:

> "We decline to put police doing their jobs in the same category as criminals doing theirs. Because criminal activities serve no legitimate purpose, there is no reason to spare criminals from even remote consequences of their actions; deterrence, by forcing criminals to assume responsibility for all the harm they cause by their anti-social conduct, is the very essence of criminal law. Law enforcement personnel, by contrast, serve important purposes; the risk of personal liability, if taken beyond its proper scope, may make police timid and deter activities necessary for our protection. Criminals, moreover, can largely control the circumstances of their crimes and thus minimize the risk that force will be necessary; law enforcement personnel must take the situation as they find it." (*Ibid.*)

The MPC's definition of deadly force simply is not appropriate for use in civil cases such as this, and should not be utilized in circumstances for which it was never intended by its drafters.

B. The New Standard Adopted By The Ninth Circuit Is Unworkable, And Will Make It Impossible For Law Enforcement To Make Effective Use Of The Expanding Options Of Non-Lethal Weapons

Allowing this broad-reaching re-definition of deadly force to stand will have a monumental impact on law enforcement in the Ninth Circuit. If, as the *Smith* decision holds, the definition of deadly force includes any use of force that "creates a substantial risk of causing . . . serious bodily injury", then virtually every use of force by a law enforcement officer will be subject to a claim that it constitutes the use of "deadly" force. Simply looking at existing definitions of "serious bodily injury" reveals this. For example, California Penal Code § 243(f)(4) defines "serious bodily injury" to mean "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." Equally expansive is the definition in the Sentencing Guidelines for the United States Courts, which defines "serious bodily injury" to mean "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." (18 USC Appendix, §1B1.1, Application Note 1.(L).)

It certainly can be, and undoubtedly will be, argued that each and every tool utilized by law enforcement to assist in subduing and capturing criminals presents a "*risk*" of causing one or more of the injuries listed above. (E.g. Batons can break bones, chemical sprays can cause pain and impair breathing, various devices may cause loss of consciousness, etc.) In fact, it can be argued that even

the use of *unarmed* force presents such a risk. (E.g. Attempting to grab a running suspect may cause him or her to fall to the ground and suffer serious injury, thus arguably constituting the use of "deadly" force.) And any injury that involves any breaking of the skin creates a risk of infection, and infection has been deemed to constitute "serious bodily injury". (See *People v. Brown*, 234 Cal.App.3d 918, 931, 285 Cal.Rptr. 824 (Cal.Ct.App. 1991).)

It thus is hard to imagine *any* use of force that does not fit into one or more of the categories listed above, meaning that virtually every use of force becomes the use of *deadly* force. The *Vera Cruz* court commented on this possibility when it wrote that "the MPC's formulation, containing the disjunctive 'or,' would turn the deadly force rule into a 'serious bodily injury' rule, rendering *Garner*'s distinction between ordinary force and deadly force a virtual nullity. This is plainly not what the Supreme Court had in mind in *Garner*." (*Vera Cruz, supra,* 139 F.3d at 662.) Yet the *Smith* opinion is completely silent on this issue, and, by re-defining deadly force to include "serious bodily injury", has brought about the very result that was "plainly not what the Supreme Court had in mind in *Garner*."

The situations under which deadly force can properly be used are quite limited, meaning that now, in the Ninth Circuit, the circumstances under which law enforcement officers can use *any* force arguably will be limited to those narrow situations discussed in *Tennessee v. Garner*. Just how is law enforcement supposed to do its job when the criminals know that officers' hands have been tied in this manner?

The Ninth Circuit dismisses this concern by asserting that:

> "A definition including 'a substantial risk of bodily injury' is used by police in all fifty states, the District of Columbia, and Puerto Rico, and such use has not resulted in the difficulties we feared. . . . [I]t is the definition that California and the Hemet Police Department use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation – a burden that most law enforcement officials have voluntarily chosen to impose upon themselves." (*Smith, supra,* 394 F.3d at 706.)

But there is a fundamental difference between standards that a law enforcement agency may voluntarily choose to adopt and standards compelled by the Fourth Amendment. Surely the Ninth Circuit would not agree that the agencies' standards would be determinative if they called for a greater freedom to apply deadly force than that permitted by the Constitution.

Further, the reality is that large numbers of cities and counties in California *have*, since 1998, explicitly defined "deadly force" in conformity with the language approved in *Vera Cruz*, and have trained their officers pursuant to that definition. The Ninth Circuit's decision has created grave concern among numerous law enforcement agencies and officers as to how they are to conduct themselves in regard to the use of force. In particular, they are at a loss to know how to utilize non-lethal weapons, since virtually all of those weapons potentially fall within the Ninth Circuit's new definition of "deadly force", notwithstanding the fact that they are specifically designed to *avoid* causing death.

Under the Ninth Circuit's new definition of deadly force, determining whether *any* use of force amounts to the use of "deadly" force depends on what happens to the suspect *after* the force is used. (See, e.g., the Court's brief discussion whether the use of a police dog constitutes the use of deadly force. *Smith, supra,* 394 F.3d at 707.) How

can a law enforcement agency give meaningful direction to its officers regarding the use of force, or train them in that use, if there is no way to know whether any particular use of force will or will not come within the Ninth Circuit's definition of deadly force? This standard is completely unworkable. The end result may well be that officers, instead of being able to defuse situations early, and with a minimal application of force, will be left no choice but to allow those situations to escalate until there is no question that deadly force can be used, which will result in far more injuries and death – to suspects, victims, officers, and bystanders.

In addition, this new standard too will undermine this Court's *Saucier* decision, because, as with the adoption of the "least intrusive alternative" requirement, the question of whether any particular application of force amounts to the use of "deadly" force will become a question of fact. In this way too, then, the Ninth Circuit will have created a situation where qualified immunity summary judgments will be impossible to obtain on excessive force claims. As noted earlier, this Court made it clear in *Saucier* that such a restriction was unacceptable.

Accordingly, the *amici curiae* urge this Court to accept this case in order to reverse this dangerous change in the law.

CONCLUSION

The Court of Appeals in this case has turned existing law in the Ninth Circuit upside-down. Well-established standards governing the manner in which law enforcement interacts with the public have been jettisoned, and replaced with dangerous and unworkable alternatives. The Court has additionally put at risk the efficient functioning of the criminal justice system. These developments are of deep concern to the *amici curiae*, and to

the citizenry of the State of California and the rest of the Ninth Circuit. The *amici curiae* accordingly urge this Court to accept this case for hearing in order to resolve the critically important policy issues inherent in the Ninth Circuit's decision in this case.

Respectfully submitted,

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